



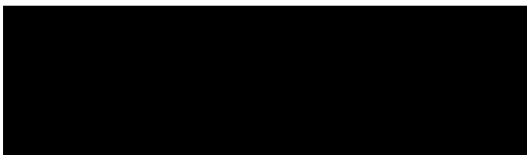
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U.S. Department of Justice

Immigration and Naturalization Service

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IMMIGRATION AND NATURALIZATION SERVICE
DIVISION OF PERSONAL SERVICES

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: SRC 01 195 51455 Office: Texas Service Center

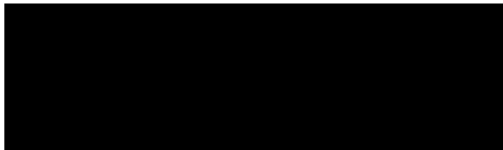
Date: 1 - MAR 2002

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER:



Adm. Serv. Div.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, who certified his decision to the Associate Commissioner for Examinations for review. The director's decision will be affirmed.

The petitioner is a freight transportation and delivery service which seeks to employ the beneficiaries as truck drivers for an additional period of nine and one-half months. The director denied the petition because it was not accompanied by a temporary labor certification from the Department of Labor.

The certifying officer declined to issue a labor certification because he determined that the petitioner had not established that its need for the occupation is temporary. The certifying officer stated:

While there is no doubt a shortage of tractor-trailer truck drivers, that shortage in and of itself does not establish a temporary need. The employer mentions having a peak season during the noted period of need ...however, there is no documentation within the case file which adequately justifies why that period of time is a peak season or different from any other time of the year

Counsel argues that the petitioner's need is temporary and that the beneficiaries' services are required for a peakload period only.

8 C.F.R. 214.2(h)(6)(iv)(A) requires that a petition for temporary employment in the United States be accompanied by a temporary labor certification from the Department of Labor, or notice detailing the reasons why such certification cannot be made. 8 C.F.R. 214.2(h)(6)(iv)(A) states that a petition not accompanied by temporary labor certification must be accompanied by countervailing evidence from the petitioner that addresses the reasons why the Secretary of Labor could not grant a labor certification.

Matter of Artee Corporation, 18 I&N Dec. 366 (Comm. 1982), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling.

8 C.F.R. 214.2(h)(6)(ii)(B)(3) states the following:

Peakload need. The petitioner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to

staff will not become a part of the petitioner's regular operation.

The petitioner has defined its peakload period as the period between June 1 and March 15. The petitioner has stated that the many of its clients have needs that are seasonal. However, the petitioner has provided insufficient evidence of such seasonal needs. One client indicates that it has year round trucking needs which include an unspecified peak season. Another client has year round trucking needs with an unexplained peak period between March and September. A third client has year round trucking needs with an unexplained peak period between August and June.

Evidence submitted by the petitioner indicates that its peakload periods are in the months of September, October, March, May and June. The evidence also indicates that shipping needs drop during the months of November, December and January. The petitioner has requested an extension of temporary stay for nine and one-half months which includes the three slowest months. There appears to be a year round need for drivers rather than a temporary one. Consequently it is concluded that the petitioner's need for the beneficiaries' services is not a temporary need.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The director's order of January 8, 2002 is affirmed.